IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

TEAM WORLDWIDE CORPORATION, Plaintiff, v. ACADEMY, LTD d/b/a ACADEMY SPORTS + OUTDOORS, Defendant.	Case No. 2:19-cv-92-JRG-RSP LEAD CASE
ACE HARDWARE CORPORATION, AMAZON.COM, INC, AMAZON.COM LLC, BED BATH & BEYOND INC., COSTCO WHOLESALE CORPORATION, DICK'S SPORTING GOODS, INC., THE HOME DEPOT, INC., MACY'S, INC., MACY'S.COM, LLC, TARGET CORPORATION, and TARGET BRANDS, INC., SEARS, ROEBUCK AND CO., SEARS HOLDINGS CORPORATION, and TRANSFORM HOLDCO LLC, Defendants.	Case No. 2:19-cv-00093-JRG-RSP Case No. 2:19-cv-00094-JRG-RSP Case No. 2:19-cv-00095-JRG-RSP Case No. 2:19-cv-00096-JRG-RSP Case No. 2:19-cv-00097-JRG-RSP Case No. 2:19-cv-00098-JRG-RSP Case No. 2:19-cv-00099-JRG-RSP Case No. 2:19-cv-00100-JRG-RSP Case No. 2:20-cv-00006-JRG-RSP CONSOLIDATED CASES

[PROPOSED] REPLY IN SUPPORT OF DEFENDANTS' OBJECTION TO PRE-ADMISSION OF PTX-COM-240, -241, -302

As the Magistrate Judge recognized in his Order on Defendants' motion *in limine* No. 1, "[u]nder 35 U.S.C. § 104, it is impermissible for TWW to establish a date of invention by reference to knowledge or use of the invention if it was only available in China or Taiwan." (Dkt. 439 (Order) at 4.) That ruling is fatal to the pre-admission of PTX-COM-240, PTX-COM-241, and PTX-COM-302—three pages of drawings undisputedly developed and maintained in Taiwan and/or China for which TWW has no use other than this "impermissible" purpose. Accordingly, Defendants respectfully ask the Court to overrule the Magistrate Judge's pre-admission of the Foreign Evidence.

The Magistrate Judge's ruling unambiguously prohibits TWW from establishing a date of invention using the Foreign Evidence, a conclusion TWW does not dispute in its Response. (Dkt. 439 (Order) at 4 ("[I]t is impermissible for TWW to establish a date of invention by reference to knowledge or use of the invention if it was only available in China or Taiwan.") (citing *Realtek Semiconductor Corp. v. Marvell Semiconductor, Inc.*, 2005 WL 3634617, at *5 (N.D. Cal. Nov. 21, 2005)); Dkt. 442 (TWW Resp.) at 2-3 (acknowledging that the Magistrate Judge's Order regarding § 104 prohibits "a specific use of evidence").) Because TWW does not dispute that the Foreign Evidence was not maintained, disclosed, or developed outside Taiwan or China, under § 104, the Foreign Evidence is—as a matter of law—unavailable to TWW as support for a date of invention earlier than the December 18, 2000 effective filing date of the '018 Patent.

It is also clear that TWW seeks to use the Foreign Evidence for exactly this "impermissible" purpose. At the pre-trial hearing, TWW represented to the Court that it intended to use the Foreign Evidence to "establish that [Mr. Wang] came up with this idea first," as "relevant to the priority date," and "relevant to that determination of whether Mr. Wang

invented the idea at issue first." (Dkt. 407 (Pre-Trial Hrg. Tr.) at 34:24-25, 35:6-7, 36:2-4.) Each is an "impermissible" attempt to establish an earlier date of invention.

Because the deposition designations for Mr. Tony Wang—already finalized and adjudicated at the pre-trial hearing—do not include testimony related to the Foreign Evidence, and because TWW's only other fact witness, Mr. Ken Wang, testified that he had no knowledge of the content, accuracy, or authorship of the Foreign Evidence (Ex. 1 (Wang Dep. Tr.) at 75:25-76:20, 81:11-22, 82:17-24), the only witnesses who could potentially testify as to the Foreign Evidence are TWW's experts. But TWW's expert reports include only "impermissible" analysis under § 104. The only substantive discussion of the Foreign Evidence by TWW's technical expert, Dr. Stevick, is under the heading "Priority Date of the '018 Patent," to opine that the date of invention is "at least September 27, 2000," (Ex. 2 (Stevick Reb. Rept.) ¶¶ 103-110.) Dr. Stevick repeats this conclusion without elaboration, referring to "evidence" that "Mr. Wang invented the disclosure in the '018 Patent at least as early as September 27, 2000," and "the '018's September [2000] priority date" to discuss why references should not be considered prior art. (*Id.* ¶¶ 202, 209-211, 375.) That type of discussion is precisely the discussion that the Magistrate Judge found precluded by § 104. For his part, Dr. Becker never—including in his report directed explicitly to secondary considerations—even mentions, much less addresses, the Foreign Evidence. Indeed, the Foreign Evidence does not even appear in Dr. Becker's materials considered. There is, accordingly, no timely disclosed, legally permissible expert opinion related to the Foreign Evidence.

In its Response, TWW for the first time asserts that the Foreign Evidence is "relevant for several purposes including rebutting Defendants' representations about certain prior art, support for secondary considerations of nonobviousness, and providing the necessary background for

how Mr. Tony Wang came up with and developed the patented invention." (Dkt. 442 at 2-3.) TWW's novel attempts to repackage its "impermissible" analysis fail. First, as to the "representations about prior art"—as demonstrated in Dr. Stevick's report, the only "representation" TWW seeks to rebut is whether the prior art pre-dates the patented invention. Dr. Stevick does not reference the Foreign Evidence in any other context. According to § 104, that is an impermissible use. Second, as to secondary considerations, Dr. Stevick and Dr. Becker do not reference the Foreign Evidence anywhere in the context of secondary considerations. Accordingly, although TWW never explains how the Foreign Evidence is even relevant to secondary considerations, any new opinion from the experts would be untimely. Finally, as to providing "context" for the development of the patented invention, this is simply the other side of the same coin addressed in connection with the first point—a repackaging of TWW's "impermissible" date of invention analysis. Again, Dr. Stevick's only discussion of the Foreign Evidence is in relation to the purported date of invention of the '018 patent. TWW may not circumvent the statutory prohibition on this evidence through semantic games restating "conception and reduction to practice" as "how Mr. Wang came up with and developed the patented invention."

Given the limitations of its expert reports and the Magistrate Judge's determination that the Foreign Evidence may not be used to establish an earlier date of invention, TWW has no basis to properly present the Foreign Evidence at trial. This issue has been extensively briefed and presented to the Court—on summary judgment, in motion *in limine* briefing, and in the exhibit pre-admission process—and TWW has in every instance failed to articulate a legally sufficient or timely disclosed basis to present the Foreign Evidence to the jury. Accordingly, the Court should overrule the Magistrate Judge's pre-admission of the Foreign Evidence.

Dated: June 4, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically, under seal, in compliance with Local Rule CV-5(a)(7). A complete and unredacted copy of this document was served on counsel of record, all of whom have consented to electronic service, via email on May XX, 2021.

/s/ Draft

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

The undersigned hereby certifies that Target Corporation's Brief Regarding TWW's Reliance on Foreign Evidence To Support Its Priority Date is filed under seal pursuant to the Protective Order (Dkt. 94).

/s/ Draft